Indiana Department of Education

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

1-12: 99

RECENT DECISIONS

Recent Decisions is an annual communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators, and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell, General Counsel, at (317) 232-6676 or by e-mail at <kmcdowel@doe.state.in.us>.

In this Issue:

JUDICIAL DECISIONS

During the last year, there were a number of cases reported from both federal and state courts that have an effect on the provision of educational services in Indiana. Most of these cases involved matters related to special education, notably attorney fees and parental hostility.

ATTORNEY FEES AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Under the Individuals with Disabilities Education Act (IDEA), a "court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. §1415(i)(3)(B), 34 CFR §300.513(a). Congress modeled this language on similar provisions found at 42 U.S.C. §1988(b) for awarding attorney fees in certain civil rights matters. As a result, case law construing §1988 is often employed in analyzing IDEA claims. This past year saw some resolution regarding who is an "attorney," increasing consensus on the right of attorney-parents to claim attorney fees, and emerging concerns over the extent to which an advocate can recoup fees.

The Out-Of-State Attorney

Although the IDEA provides for attorney fees where the parent ultimately prevails at the administrative or judicial level, this has not proven to be a significant incentive for attorneys to represent parents or their children with disabilities in such proceedings. As a consequence, there are few attorneys who are sufficiently versed in the law and the procedure available for representation. Publicly funded advocacy groups, faced with increasing demands for services, have had to restrict representation as well. As one result of the scarcity, it is not uncommon to have parents (and sometimes public schools) represented by attorneys who are not licensed in the state where the IDEA administrative proceeding is being conducted. Congress, in enacting the IDEA, did not limit any state's traditional control over the regulation of the practice of law. See, for example, Arons v. New Jersey State Bd. of Education, 842 F.2d 59, 63 (3rd Cir. 1988), also discussed *infra*. The question that had not been answered directly was: Can an attorney not licensed to practice law in a state, or otherwise permitted to represent, as legal counsel, a party, recover attorney fees for such representation?

The Indiana Department of Education raised this question in Powers v. Indiana Department of Education, 61 F.3d 552 (7th Cir. 1995), where the parent was represented by an attorney licensed to practice law in Illinois but not Indiana. However, the matter was decided on procedural grounds (failure to file timely), so this question was not answered. See Recent Decisions 1-12: 1995.

The issue was raised again this past year, but this time a court had the opportunity to address it. In Nathan C. v. School City of Hobart, 30 Individual with Disabilities Education Law Report (IDELR) 396 (N.D. Ind. 1999), an attorney licensed to practice law in Illinois and Missouri represented two separate families in two separate IDEA hearings (in Indiana, designated as

"Article 7" hearings after the Indiana State Board of Education's rules for special education as found at Title 511 of the Indiana Administrative Code (IAC), Article 7). The cases were eventually resolved in such a fashion that the court found the parents had substantially prevailed. Nevertheless, the school refused to consider attorney fees, arguing that the attorney was not licensed to practice law in Indiana and had not sought permission to represent either family. As such, he could not claim to have performed legal services because this would amount to the unauthorized practice of law. The court agreed, noting that an attorney not admitted to practice in Indiana may not recover for services rendered in Indiana, Harris v. Clark, 142 N.E. 881 (Ind. App. 1924), and that practicing law in Indiana without having been admitted to practice here is a crime under Indiana law. I.C. 33-1-5-1. The court was not persuaded by the plaintiffs' argument that certain policy letters from the U.S. Department of Education would permit recovery of attorney fees under these circumstances.[1] The court noted that the federal policy letters did not authorize payment of attorney fees. As the court noted at 30 IDELR at 398:

> At most, they [the federal policy letters] point out that since claimants under the IDEA can be represented by non-lawyers in state administrative proceedings, a lawyer not licensed in a jurisdiction can appear there on behalf of a claimant; the letters do not state that the lawyer can collect statutory attorney's fees for an appearance in a state where the lawyer is not licensed.

The Indiana federal district court was heavily influenced by a decision published while Nathan C. was pending. In Z.A. v. San Bruno Park School District, 165 F.3d 1273 (9th Cir. 1999), the first case to address the foreign attorney issue, the 9th Circuit Court of Appeals, in addressing an IDEA dispute arising out of California, ruled that an attorney not licensed to practice law in California cannot recover attorney fees for representing a family in an IDEA administrative hearing. California, like Indiana, forbids any person from recovering compensation for legal services as an attorney unless that person is a member of the state bar at the time the services were rendered. Although the attorney in this case was admitted to one of the federal district courts in California, one does not have to be a member of a state bar in order to be admitted to a federal district court to practice law in that district court. The district court held–and the 9th Circuit affirmed–that the out-of-state attorney "could only appear at the hearing in a non-lawyer advisor capacity" as allowed by IDEA. At 1276. The court added: "A person is or is not licensed to practice law in a
particular forum. There is no half-way. If not licensed, one cannot practice in that forum, and

[1]In Letter to Eig, Education of the Handicapped Law Report (EHLR) 211:270 (OSEP 1980) and Virginia Department of Education, EHLR 257:349 (OCR 1982), two agencies of the U.S. Department of Education did indicate that an attorney could represent a client in an IDEA proceeding without being admitted to the bar of that state, but this was based upon the right of the parent to be accompanied and advised by "individuals with special knowledge or training" in this area. See 20 U.S.C. §1415(h)(1), 34 CFR §300.509(a)(1). However, neither of these federal agencies stated that such a foreign attorney could recover attorney fees for legal work performed in a state where the foreign attorney is not licensed. See "Attorney Fees: Parent-Attorney Under IDEA," Recent Decisions 1-12: 1995.

cannot charge, or receive attorney's fees for such services under penalty of criminal law."[2] Id.

The Attorney-Parent and IDEA

As noted in "Attorney Fees: Parent-Attorney Under IDEA," Recent Decisions 1-12: 1995, the Indiana Supreme Court determined that a parent who is also an attorney cannot recover attorney fees under the IDEA because such an attorney-parent is a "*pro se* parent and a party" rather than an attorney, and "a *pro se* litigant...is not entitled to [attorney] fees."[3] Miller v. West Lafayette School Corporation, 665 N.E.2d 905 (Ind. 1996). The Indiana court relied upon Rappaport v. Vance, 812 F.Supp. 609 (D. Md. 1993), appeal dismissed, 14 F.3rd 596 (4th Cir. 1994), the first such opinion holding that a parent-attorney is a *pro se* litigant and thus not entitled to attorney fees. Rappaport, in turn, was based upon Kay v. Ehrler, 499 U.S. 432, 111 S.Ct. 1435 (1991), which held, for purposes of 42 U.S.C. §1988, attorneys who are *pro se* litigants are not entitled to attorney fees in civil rights actions because "the word 'attorney' assumes an agency relationship, and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under §1988." 499 U.S. at 435-36, 111 S.Ct. at 1437-38. Because IDEA's attorney fee language is based on the language in §1988 (see *supra*), more courts are extending the U.S. Supreme Court's rationale in Kay to IDEA situations. The following are the most recent cases in this respect.

1. Doe v. Board of Education of Baltimore Co., 165 F.3d 260 (4th Cir. 1998), *cert. den.*, 119 S.Ct. 2049 (1999). Relying upon Kay, the 4th Circuit noted that a *pro se* attorney-parent deprives the child of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting evidence, cross examining hostile witnesses, formulating legal arguments, and in ensuring that reason–rather than emotion–dictate the proper tactical response to unforseen developments. At 262. "Attorney parents are generally incapable of exercising sufficient independent judgment on behalf of their children to ensure that 'reason rather than emotion' will dictate the conduct of the litigation." At 263. It is noteworthy that the 4th Circuit did not close the door entirely. The court stated that it is possible attorney-parents might be reimbursed in situations where they have prevailed in "difficult, unpleasant cases when they can demonstrate that they could not obtain other representation..." At 264. But these circumstances were not present in this case.

2. Woodside v. School Dist. of Philadelphia Board of Education, 31 IDELR ¶210 (E.D. Pa. 2000). The attorney-father of a six-year-old child with a disability initiated an IDEA administrative hearing to challenge the school district's proposed occupational and

---

[2]Although a foreign attorney can apply to the Indiana Supreme Court to appear *pro hac vice* ("for this occasion") in certain cases, this only applies to courts and not to administrative actions. See *Indiana Rules for Admission to the Bar and Discipline of Attorneys*, **Rule 3, §2(a)**.

[3]"*Pro se*" literally means "for one's self." The term is applied to one who represent's himself in civil and criminal actions without benefit of counsel.

physical therapies. The parent prevailed and sought attorney fees. The federal district court, although noting that the 3rd Circuit has applied Kay to deny *pro se* attorney fees under other fee-shifting statutes, observed that the specific application to IDEA had not yet arisen. Nevertheless, relying upon Kay, Doe, Miller, and Rappaport, the Pennsylvania federal district court held that the Congressional intent in creating such fee-shifting statutes was "to encourage the successful prosecution of meritorious claims" by providing an incentive to retain independent counsel. "As the *Doe* court pointed out, loving parents can always be counted on to protect the rights of their children regardless of the existence of a statutory financial award for doing so." Accordingly, the court found Congressional intent was not to reward parents for exercising a parental responsibility. The attorney fee request was denied.

The Advocate and Attorney Fees

Although the IDEA, as a hearing right, allows a parent to be accompanied and advised by individuals with special knowledge or training with respect to the problems of children with disabilities, this hearing right does not mean a lay advocate has the right to "represent" a parent or child in the sense that such representation, should the parent ultimately prevail, translate into attorney fees.

The seminal case in Indiana on this issue did not involve IDEA but §1988, which, as noted *supra*, serves as the basis for the fee-shifting language in IDEA. In Grooms v. Snyder, 474 F.Supp. 380 (N.D. Ind. 1979), an inmate, acting as a "jailhouse lawyer" for another inmate, sought and obtained approval of the court to act as a "lay advisor" for the inmate in his civil rights action against certain local and state law enforcement officials. The inmate prevailed at the subsequent civil rights trial, with the jury awarding damages in excess of $11,000. The "jailhouse lawyer" then sought, under §1988, to recover "legal assistance fees" for the 35 hours he spent in assisting the inmate in his civil rights action. The court, in denying fees to a non-attorney lay advocate, noted that Congress created the fee-shifting provision to attract competent counsel. In this case, the "jailhouse lawyer" volunteered his services and was not asked to do so, or otherwise directed by the court to do so. "Section 1988 appears to require the existence of an attorney-client relationship... The fee award statute refers only to attorney fees, it makes no mention of law clerks, paralegals, secretaries, or office overhead." At 384. Accordingly, the court denied the application for "legal assistance fees."

1. **Paralegals**. In Howey by Howey v. Tippecanoe School Corporation, 734 F.Supp. 1485, 1493 (N.D. Ind. 1990), the court declined to award "paralegal fees" under the IDEA to the parent for her efforts in a due process hearing. The court noted that the student and parent were represented by counsel in the hearing. However, the parent "has no formal training or certification as a paralegal. The court is unaware of any authority under the facts of this case, or within the statutory provisions [of IDEA] here involved for such an

award."[4]

2. **Lay Advocate**. Ironically, most of the reported case law involving lay advocates attempting to recover fees under IDEA have involved the same New Jersey advocate. The initial foray into this issue is reported in Arons v. New Jersey State Board of Education, 842 F.2d 58 (3rd Cir. 1988), *cert. den.*, 488 U.S. 942, 109 S.Ct. 366 (1988). Arons, the court acknowledged, has substantial expertise in representing the interests of parents in due process hearings. She has been active in New Jersey regarding special education issues since 1976. Arons is not an attorney. A state law specifically forbids lay advocates from receiving a fee for representing parties in administrative proceedings. Although Arons originally filed suit to recover her fees from the State, she later amended her complaint, requesting instead the authority to charge parents for her services. The federal district court found that IDEA does not create a right to compensation for lay advocates who are functioning as the equivalent of lawyers. The court also found no legal infirmities with the State's proscription on advocates receiving fees, noting that such a law "furthers the state's legitimate interest in regulating the practice of law by nonlawyers." At 60. However, the district court added an important distinction: Even though New Jersey's law prohibits a lay advocate from receiving a fee for such legal services (Indiana does not have such a law), Arons is entitled to be paid for her "educational expertise." As a consequence, she is "free to charge as an expert witnesses or as an educational consultant for time spent in preparing for and appearing at the hearings." Id. The law, the court noted, only bars "compensation for services for which she has no recognized expertise or training–in the provision of legal services." Id. The Third Circuit Court of Appeals affirmed, finding that IDEA did not preempt state laws with respect to the governance of the practice of law, nor did IDEA create a right for lay advocates to recover fees. Congress, the court observed, did not intend to place expert and legal counsel on the same footing. At 62, 63. The Circuit Court reiterated the district court's emphasis that "nothing prevents her [Arons] from receiving compensation for work done as an expert consultant or witness." At 62, 63.

3. The same advocate appeared later in Connors v. Mills, 34 F.Supp.2d 795 (N.D. N.Y. 1998), a case arising out of New York rather than New Jersey. The parent unilaterally enrolled her child in a private placement and sought reimbursement from the local public school district. The parent retained Arons to assist her in preparing for the hearing and to represent her at the hearing. There followed a series of settlement conferences, breakdowns in communications, additional due process hearing requests, and additional

---

[4]After this case was decided, the Indiana General Assembly enacted P.L. 6-1993, §1, codified at I.C. 1-1-4-6, permitting the recovery of paralegal fees as a part of an attorney fee request. However, a paralegal is defined as one who is (1) qualified through education, training, or work experience; (2) employed by a lawyer, law office, governmental agency, or other entity; and (3) working under the direction of any attorney in a capacity that involves the performance of substantive legal work that usually requires a sufficient knowledge of legal concepts and would be performed by the attorney in the absence of the paralegal.

settlement conferences. Arons represented the parent throughout all of these proceedings. Eventually, the parent filed suit, *pro se*, to resolve placement issues and to recover fees for the services provided by the non-attorney advocate. The school district did not challenge the parent's assertion that she was a "prevailing party" under IDEA, nor did the school challenge the reasonableness of Arons' fees. It did challenge the parent's right to recoup non-attorney fees in this fashion. The federal district court analyzed Arons v. New Jersey, *supra*, in light of IDEA's due process right provisions. The New York court observed that while "the Third Circuit noted that the text of the IDEA provided for advice or assistance from 'individuals with special knowledge or training,' *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3rd Cir. 1988), it did not specifically provide for compensation to a lay advocate in his or her representative capacity. The distinction between representation and mere advice was important to the court." At 807. However, the New York federal district court noted that New York law permits lay advocates to represent parents at due process hearings. Accordingly, this court found that New York law "provides for the performance of legal services by lay advocates." Id. Nevertheless, this does not equate a lay advocate's efforts with an attorney's efforts. An attorney's education, experience, and training cannot, in most circumstances, be met by a lay advocate. At 808. "While Mrs. Arons has proven herself to be a competent, capable, and effective advocate for parents dealing with IDEA issues, a ruling in her favor would also inure to the benefit of those who are less competent and less scrupulous unless such a ruling was confined in application by appropriate regulations that, for example, set forth specific standards individuals had to meet in order to qualify as IDEA lay advocates."
Id. The plaintiff's request to be reimbursed for Mrs. Arons' fees under IDEA was denied. However, recovery was permitted for Mrs. Arons' efforts as an "educational consultant" in "producing technical reports, attending the hearings, or in advising Mrs. Connors regarding educational problems, the evaluation thereof, and the proper educational placement for [the student]." The fees totaled about $3,000.00. Id.

4. Borough of Palmyra Bd. of Education v. R.C., 31 IDELR ¶3 (D. N.J. 1999) also involves Mrs. Arons but under a different disability-related law–Sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, as implemented by 34 CFR Part 104. The dispute arose over reimbursement for a private school placement. Arons represented the family throughout a seven-day hearing, but apparently did not describe herself as an advocate or her work as advocacy. The Administrative Law Judge (ALJ) found in favor of the family. Sec. 505 of the Rehabilitation Act, 29 U.S.C. §794(a) has a typical fee-shifting attorney fee provision as found in IDEA and at §1988. Her fees and expenses totaled $33,542.00 for these efforts. The court, relying upon the Third Circuit's opinion in Arons v. New Jersey, *supra*, found no merit in the school's assertion that Arons was an "advocate" and, under New Jersey law, was not entitled to recover any fees for advocacy work. This district court noted that, although Arons could not recover attorney fees (or advocate fees), she could still recover fees associated with her expert educational consultation. At 12-14. The court recognized Arons as "an expert in the field of special education." At 12. Although the court found that a reasonable rate for Arons' expert consultation work

would be $200 an hour, the court reduced a number of hours itemized on her time sheets, excluding such activities as attending workshops and conferences (professional development activities), consultation unrelated to the student or the student's needs and activities directed more at reassuring the parents and helping them cope than providing a service (these were apparently described as "therapy or counseling," and included conversations on the phone and while driving to and from meetings, as well as in-person discussions), and certain amounts of travel time for meetings just with the parents. The court also rejected fee requests for activities of a legal nature (preparing direct and cross examinations and discussing availability of legal representation by others). The fees not approved by the court can be recovered from the parents. The court approved $16,442.00 as "consulting fees" for Mrs. Arons, to be paid by the school district.

"Prevailing Party" and Attorney Fees

IDEA at 20 U.S.C. §1415(i)(3) grants to a court the discretion to award reasonable attorney fees as part of the costs to a parent of a child with a disability who is the prevailing party in proceedings under this Act. Whether or not a parent is a "prevailing party" can be difficult to ascertain at times.

In Linda W. *et al.* v. Indiana Department of Education *et al.*, 200 F.3d 504 (7th Cir. 1999), the 7th Circuit Court of Appeals upheld the federal district court's determination that the parent was not the prevailing party under IDEA even though she obtained some of the relief she sought.

Linda W. began as two different hearings, Article 7 Hearing No. 705.93 and Article 7 Hearing No. 735.94. Both involved the same student, who had been unilaterally placed in a private school for students with disabilities. Although the parent challenged the school district's Individualized Education Program (IEP) for her son and sought reimbursement for tutoring and a private school placement, she lost on the substantive issues relating to the student's IEP and reimbursement for the private school placement. She did receive around $1,000 in reimbursement for private tutoring costs.

The 7th Circuit described the tutoring reimbursement as "paltry compared with the relief they were seeking." The court was reluctant to award fees based on "a procedural victory" alone.

> [T]o prevail in litigation one must win on the merits, and not just score tactical victories in interlocutory skirmishes.

At 507. The court upheld the district court's finding that the defendants were "the prevailing parties in this litigation." Hence, the parent was not entitled to attorney fees under IDEA. Id.

PARENTAL HOSTILITY OR INTRANSIGENCE AND IMPLEMENTATION OF THE INDIVIDUALIZED EDUCATION PROGRAM

When a student is determined eligible for services under IDEA, the entitlement is the student's. Although written permission of the parent or guardian is required to implement operative placements, where a parent refuses to provide written permission, a public school district could request mediation to attempt to resolve the impasses. Ultimately, however, if written permission is not obtained, the public school district would have to request a due process hearing. An Independent Hearing Officer (IHO) under IDEA procedures has the authority to order the placement of a student where the student's individualized education program (IEP) can be implemented, notwithstanding the lack of written permission from the parent. Administrative and judicial adjudicators, however, have limits on their real authority to implement their orders where parental hostility or intransigence thwarts any effort at effecting a placement not agreeable to the parent. These limitations translate to limitations on the public school districts as well. There have been two notable cases, both from Indiana, on this troublesome issue.

1. E.N. v. Rising Sun-Ohio County Community School Corp., 720 N.E.2d 447 (Ind. App. 1999) began as a special education hearing dispute over the appropriate IEP for a student with significant seizure activity that was not responding to medication (**Article 7 Hearing No. 989.97**). Although the parent requested the hearing, she would not share any medical information with the school and would not otherwise comply with three separate orders from the IHO to produce the medical records. The school sought to enforce the IHO orders in Ohio County Superior Court. On June 22, 1998, the court granted the school's Petition to Enforce the IHO's Orders and directed the parent to comply with the orders by signing an Authorization for the Release of Medical Records and Information. The parent did not comply with the court's order. The school filed a Verified Petition for Contempt of Court and a Petition for Appointment of a Guardian. Thereafter, the parent executed the release. Although the court noted that the parent had finally complied with its order, it noted the history of parental obstruction that was jeopardizing the educational welfare of the parent's child. On February 1, 1999, the court granted the school's petition in part, appointing a guardian for the child for the limited purpose of determining the appropriate educational program for the student. The limited guardian and the school eventually reached consensus as to the appropriate program for the student, while the parent appealed the court's decision. Under I.C. 29-3-5-1 *et seq.*, a guardian can be appointed for a person, but the person for whom a guardian is sought must be (1) incapacitated or a minor, and (2) the appointment of a guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person or minor. Although the trial court found the student to meet the first criteria, the appointment of the guardian was based on the student's "best interests" and was not judicially determined to be "necessary." E.N. v. Rising-Sun, 702 N.E.2d at 451.

   The "best interest" standard is not usually applied to a non-custodial limited guardianships but to natural parents. Id. However, the Court of Appeals found that such

a standard could be read into the guardianship statute. This, however, does not overcome the statutory requirement that the court find such a guardianship "necessary," which the court did not specifically find, although the recitation of facts in the case would lead to such a conclusion. At 451-52. Although the statute does not define "necessary," the court interpreted this term to mean "absolutely essential." The Court did not "condone Mother's decision not to provide the records to School, especially after the Independent Hearing Officer ordered her to do so. However, even without the medical records, School was still able to draft an IEP... Too, School was eventually able to obtain the records through the administrative and judicial processes. In sum, the evidence does not indicate that Mother's conduct prevented School from providing a free and appropriate education for E.N. or necessitated the appointment of an educational guardian." At 452.

The court noted that, although IDEA grants the parent the right to participate in meetings to discuss and develop IEPs, it does not require the parent to attend. Under Indiana administrative regulations, the school could still meet without the parent, develop an IEP, and then seek permission from an IHO to implement the program. As noted by the court, the lack of consent by the parent did not relieve the school from its obligation to provide a free appropriate public education (FAPE) to the student. At 453. Because such avenues were available–and were utilized–by the public agency in an effort to provide the student with a FAPE, the appointment of the limited guardianship was not "necessary." At 453-54. The court added the following: "We understand and appreciate School's frustration in attempting to provide a free and appropriate education for a developmentally disabled student in the face of a recalcitrant and uncooperative parent. However, obtaining a limited guardianship over the objection of a parent in order to accomplish its responsibilities goes too far." Although the parent's activities made the school's attempt to comply with the law a "difficult one to accomplish, ...it was not impossible." At 453.

2. The E.N. case was preceded by M.S.D. of Martinsville v. Buskirk, 950 F.Supp. 899 (S.D. Ind. 1997). In Buskirk, the school and parent had a marked history of discord over the educational needs of Buskirk's son. There had been several administrative hearings and complaint investigations. After one series of hearings, the school petitioned the federal district court to enforce orders of two IHOs with respect to implementation of the student's IEP, and to appoint an educational surrogate parent (see 34 CFR §300.515 and 511 IAC 7-9-1) to assume the role of the parent for educational decision making. At about this time, the parent initiated another hearing and withdrew the student from school. The district court declined to address the issues, noting that the matter was brought to federal court under the "judicial review" provisions of IDEA, but the school was not an "aggrieved party," the two IHOs having ruled substantially in the school's favor. "A suit to enforce an administrative decision clearly is not brought by a party aggrieved by that decision." At 902. The court also refused to assume jurisdiction under the "stay put" provision of IDEA, which requires the maintenance of a student's current educational placement during pendency of IDEA procedures. See 20 U.S.C. §1415(j), 34 CFR §300.514. The "stay put" provision, the court stated, was not intended to confer on

the court the type of jurisdictional authority necessary to enforce final or interim orders of IHOs.

INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education (SBOE) has the authority to determine the legal settlement of a student, which includes the right to review a school district's expulsion for lack of legal settlement; a student's right to transfer to another school district; a student's right to attend school in any Indiana public school district; the amount of transfer tuition owed (along with attorney fees and interest in some cases); and any other issue involving legal settlement, right to transfer, and transfer tuition. See, generally, I.C. 20-8.1-6.1-10(a).[5] The SBOE made a number of important decisions this past year, especially with respect to joint custody as this affects legal settlement, the effect on legal settlement when the non-custodial parent assumes physical custody, legal settlement when the children reside with a relative, SBOE jurisdiction over interdistrict transfer schemes, and the right to transfer from public school placed on probationary accreditation status.

Custody by a Relative: Legal Settlement

Legal settlement of a student is not always dependent upon the legal establishment of a guardianship. Sometimes the guardianship arises from the circumstances. Such was the situation in In the Matter of C.H. and J.H. and the M.S.D. of Washington Township, **Cause No. 9811029** (SBOE 1999), included as **Attachment A.**

The two students had lived with their grandparents since birth. When the grandparents moved into the MSD of Washington Township in August of 1993, the students moved with them. The students' names appear on the grandparents' apartment lease as occupants. Their continuous residency was verified by the apartment complex. The mother resides in a different public school district. Although the grandparents provide the care and support for the students and claim them as dependents on their tax returns, the mother does provide some support by buying them clothes. The school district initiated expulsion proceedings based on a lack of legal settlement. See I.C. 20-8.1-5.1-11. The school district conditioned acceptance of the students upon the mother and grandparents' establishment of legal guardianship, which they were unable to do by a given date. When the mother and grandparents could not meet the date given, the school district expelled the students.

The State Board has jurisdiction to review all expulsions for lack of legal settlement. See I.C. 20-8.1-6.1-10(a)(1). In reversing the school's expulsion, the State Board noted the mother and the grandparents had executed the Third-Party Custodial Statement and Agreement for each student. These forms, which are prepared by the Indiana Department of Education and

[5]The State Board has other adjudicative responsibilities as well, including challenges to probationary accreditation status accorded to a public school or public school corporation. I.C. 20-1-1.2-17. However, none of the other adjudicative functions of the State Board resulted in any significant holdings this past year. As a result, only the school attendance issues are addressed in this article.

disseminated statewide as required by I.C. 20-8.1-6.1-1(c), assist in establishing who will be a particular child's guardian in circumstances where such a determination is difficult to discern. In this case, the mother signed the forms, acknowledging the students were residing with the grandparents, and the grandparents signed, agreeing to assume all duties, responsibilities, obligations, and liabilities of the parent. For the purposes of attending school tuition free, the students had established legal settlement. State law does not require that admittance to school be conditioned upon the establishment of a legal guardianship.

Custody by the Non-Custodial Parent

In the Matter of J.S.B. and the Logansport Community School Corporation, **Cause No. 9907017** (SBOE 1999) involved a question of legal settlement when a student assumes residency with the non-custodial parent. J.S.B. was a 14-year-old student repeating the eighth grade. His parents divorced in 1990, with the mother awarded custody. The father remained within the school district, but the mother eventually moved to another state. The mother, due to her work schedule, was unable to provide adequate supervision of J.S.B. As a result, he failed all of his subjects and was retained. He also experienced emotional turmoil and attempted suicide. The student returned to live with his father during the summer of 1999. He previously resided with his father and stepmother during the 1997-1998 school year. The school allowed him to attend tuition free after the father executed one of the custodial forms prepared and disseminated by the Indiana Department of Education under I.C. 20-8.1-6.1-1(c). When the father sought to enroll the student for the 1998-1999 school year, however, the school questioned the custodial status of the father, indicating that his custodial status would have to be resolved through the court before the student would be allowed to attend school tuition free. The student appealed to the State Board to resolve his legal settlement and his right to attend school. See I.C. 20-8.1-6.1-10(a)(3)(A), (C).

At issue was the interpretation and application of I.C. 20-8.1-6.1-1(a)(2), which reads in relevant part:

> (2) Where the student's mother and father...are divorced or separated, the legal settlement of the student is the school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations:
>
> > (A) Where no court order has been made establishing the custody of the student.
> >
> > (B) Where both parents have agreed on the parent or person whom the student will live.
> >
> > (C) Where the parent granted custody of the student has abandoned the student...

The school had also raised an issue as to the continuing legal effect of the custodial forms prepared and disseminated by the Indiana Department of Education. I.C. 20-8.1-6.1-1(c) reads in relevant part:

> (c) The superintendent of public instruction shall prepare the form of agreement to be used under subsection (a)(2) and a form to be executed by any person with whom the student is living under subsection (a)(2)... The execution of the latter form by the person and its continuance in force is a condition to the application of subsection (a)(2)... The form must contain an agreement of the person that the person shall, with respect to dealing with the school corporation and for all other purposes under this article, assume all the duties and be subject to all the liabilities of a parent of the student in the same manner as if the person were the student's parent. On the execution of that form and for as long as it remains in force, the person shall have these duties and liabilities.

There was no question the student was attempting to reside with the father solely or primarily to attend school in the school district. He was sent to live with his father due to the mother's inability to provide proper supervision and assistance, which resulted in academic failure and personal turmoil. The mother could not provide the necessary structure, supervision, and academic assistance; the father and stepmother could. Further, the father was willing to sign the custodial form prepared and disseminated by the Indiana Department of Education. This established legal settlement within the school district such that the student could attend school tuition free.[6] The custodial forms, as required by statute, are legally sufficient for the purposes intended.

Interdistrict Transfers and the Right to Attend School

Although the SBOE has consistently held that it does not have the authority to decide disputes involving intradistrict transfers within a public school district (see ***Probationary Accreditation Status and Transfer Tuition***, *infra*), it has maintained that it does have the authority to resolve disputes involving interdistrict transfers. Although most such disputes arise under the specified categories for transfers under I.C. 20-8.1-6.1-2 and 511 IAC 1-6-3 (curriculum, overcrowding, medical, and probationary accreditation status), there are situations where a public school district creates a transfer right for certain of its students, usually through cooperative arrangements with other public school districts to provide vocational programs. The SBOE has exercised jurisdiction under I.C. 20-8.1-6.1-10(a)(3)(B), (C), which grants the SBOE the authority to resolve all disputes involving the "[r]ight to transfer" or the "[r]ight to attend school in any school corporation." The State Board's authority in this respect was directly challenged this past year.

In the Matter of J.A.M. and the South Bend Community School Corporation, **Cause No. 9905012** (SBOE 1999) presented the State Board with a unique set of circumstances. The public school district, in 1987, created a special transfer right for certain students who resided in a section of Greene Township in St. Joseph County. The "Greene Township Resolution" permited

[6]Notwithstanding the above, the father had petitioned the court to modify the custody order to grant him joint custody. A hearing on his uncontested petition was pending at the time of the State Board hearing on this matter.

certain students to transfer to the John Glenn School Corporation, which was closer to the residents, and thus resolved a movement to disannex the area. The resolution, by its terms, created a presumption of "better accommodation" in favor of any "eligible student." The Greene Township Resolution, however, contained an ambiguity as to who would be considered an "eligible student." One reading of the resolution could lead one reasonably to the conclusion that, once a student enrolled in South Bend's schools, the student was no longer eligible for transfer to John Glenn. However, the resolution's language did not preclude a student already enrolled in South Bend–and never enrolled previously in John Glenn–to initiate a transfer. J.A.M. had been enrolled in the South Bend schools since kindergarten. He was about to enter middle school when his parents sought to exercise the right to transfer under the Greene Township Resolution, which, they asserted, applied to them because they satisfied the residency requirements and the student satisfied the requirements to be an "eligible student" due to his birth date and his previous lack of enrollment in the John Glenn district. When the school denied the transfer request, the parents initiated an appeal to the State Board.

The school district challenged the jurisdiction of the State Board, asserting several grounds:

1. Any transfer right created was not a transfer right created by statute under I.C. 20-8.1-6.1-2 but by a voluntary agreement.

2. Although the resolution creates a presumption of "better accommodation" for certain "eligible students," the mere fact this language appears in the resolution and in the primary transfer tuition statute, I.C. 20-8.1-6.1-2, does not confer jurisdiction upon the State Board because the statute limits the State Board to considerations of "curriculum offerings" and "crowded conditions."

3. Notwithstanding the above, the school also argued the student was not an "eligible student" under the resolution because he had been enrolled in South Bend's schools.

The State Board denied the Motion to Dismiss, which the school raised on three separate occasions. Pertinent holdings of the State Board are as follows:

- Where an Indiana public school corporation has created a right to transfer interdistrict, as opposed to intradistrict, the State Board of Education will have jurisdiction.

- I.C. 20-8.1-6.1-2 does not limit the State Board to determinations of "better accommodation" where curriculum offerings and crowded conditions are alleged. The referenced section reads as follows:

> (a) ... Whether the student can be better accommodated depends *on such matters as*:
>
> (1) crowded conditions...; and
>
> (2) curriculum offerings at the high school level that are important to the vocational or academic aspirations of

the student.

Emphasis added. The phrase "on such matters as" unequivocally "expresses the legislature's intent that the list of...criteria need not be inclusive." Commission on General Education v. Union Township Schools, 410 N.E.2d 1358, 1361 (Ind. App. 1980); Commission on General Education v. Union Township Schools, 419 N.E.2d 181 (Ind. App. 1981).

- The General Assembly has conferred upon the State Board the obligation to hear disputes involving a student's right to transfer or right to attend school in any school corporation. I.C. 20-8.1-6.1-10(a)(3)(B),(C). This language is sufficiently stated to grant the student the right to appeal to the State Board as to whether or not he is entitled to transfer to another Indiana public school corporation under the "better accommodated" provisions of the local resolution.

- Although the term "eligible student" may be subject to different interpretations, the student's reading of the resolution was a reasonable one. The State Board found he was entitled to a transfer to the John Glenn School Corporation, subject to approval by the John Glenn School Corporation.

At oral argument on October 7, 1999, the State Board applied elements of contract law in explaining its finding regarding "eligible student." Because the resolution drafted by the South Bend governing body was in the nature of a contract, creating certain rights for an identified population, any ambiguity in the resolution would be construed against the maker of the document (the governing body) and not in its favor. An ambiguity exists where a provision is susceptible to more than one interpretation and reasonable persons would differ as to its meaning. In this case, the term "eligible student" was susceptible to more than one reasonable interpretation. Accordingly, the resulting ambiguity would not be read in favor of the governing body but in favor of the "eligible student."

Joint Custody and the Effect of a Dissolution Decree

By statute, the SBOE has the authority to determine the legal settlement of a student. IC 20-8.1-6.1-10(a). A juvenile court that has jurisdiction over a student, and has placed the student in a state-licensed private or public health care facility, child care facility, or foster family home, can in some cases determine the student's legal settlement. See I.C. 20-8.1-6.1-1(a)(8).[7] The question that had never been presented previously was whether or not another court could determine a student's legal settlement for the purpose of attending a specific school.

[7]Where a court determines a student's legal settlement or changes the student's placement, the court is to notify, within ten (10) days after determining the student's placement or change of placement, the school corporation of legal settlement and the school corporation where the student will attend school. I.C. 20-8.1-6.1-5.5(b)(2).

The issue finally arose in In the Matter of G.G., the Vincennes Community School Corporation, and the South Knox School Corporation, **Cause No. 9905010** (SBOE 2000), a dispute over the legal settlement of an eighth grade student whose divorced parents had joint custody. The mother lived in South Knox while the father resided in Vincennes. On January 13, 1999, the parents obtained a modification of their divorce decree from the Knox County Superior Court II that stated the following in rhetorical paragraph 4:

> School: The primary purpose of the parties' agreement and the resulting order of this Court is to satisfy residency requirements established by the Vincennes Community School Corporation.

Vincennes determined the student's legal settlement was in the South Knox School Corporation. The parent appealed this determination to the SBOE under I.C. 20-8.1-6.1-10(a)(3)(A).

On appeal, the SBOE determined the student lived most of the time with his mother rather than his father. As a result, the student's "permanent and principal habitation" was at the student's mother's address and not the father's. This phrasing is derived from I.C. 20-8.1-6.1-1(b):

> The words "residence," "resides," or other comparable language when used...with respect to legal settlement...means a permanent and principal habitation which a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose. These terms are not synonymous with legal domicile. Where a court order grants a person custody of a student, the residence of the student is where that person resides.

Although the statute at I.C. 20-8.1-6.1-1(a)(2) indicates, for a student whose parents are divorced or separated, the legal settlement of the student generally will be the residence of a parent with whom the student lives whether or not there is a specific court order, I.C. 20-8.1-6.1-1(a)(1) provides as follows:

> (a) The legal settlement of a student shall be governed by the following provisions:
> (1) If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's *parents* reside. (Emphasis added.)

Petitioner argued that this provides an election on the part of the student and the parents as to which school district the student would be deemed to have legal settlement. This was not persuasive.

In an accompanying discussion section, the SBOE explained that administrative entities, such as the SBOE and public school corporations, normally do not have the authority to decline judicial orders, but this would not be the case where the judicial order lacked a legal basis for its issuance

and the targeted administrative entity (in this case, Vincennes Community School Corporation) was not a party to the court action. Citing to its past decisions regarding guardianships, [8] the SBOE noted that the Knox County Superior Court, in determining joint custody by modification of the divorce decree, was not authorized to determine legal settlement of a student for school attendance purposes. Because the student resides with his mother during the school week, his legal settlement was in the South Knox School Corporation and not within Vincennes Community School Corporation's boundaries. The SBOE's decision is included as **Attachment B**.

Although the SBOE decision did not mention the case specifically, the decision in In the Matter G.G. declined to adopt or otherwise follow as precedent a federal district court decision that attempted to construe the meaning of Indiana's legal settlement statute in a case that arose from judicial review of two special education disputes and not from judicial review of a decision of the SBOE. In Linda W. *et al.* v. Indiana Department of Education *et al.*, 927 F.Supp. 303 (N.D. Ind. 1996), the federal district court read I.C. 20-8.1-6.1-1(a)(1) literally. That is, since the statute states a student has legal settlement "in the attendance area of the school corporation where the student's *parents* reside" (emphasis added), the student in this case had legal settlement in both the School City of Mishawaka and the South Bend Community School Corporation since his divorced *parents* resided in both districts. The court acknowledged this was an "awkward reading of the statute," but added that "it was the only logical way to interpret the statute, which does not explicitly address a situation in which the student lives at the homes of two parents with joint custody." At 308. The court, at footnote 7, added that "[t]he statute could, but does not, deem a student to live with the parent with whom he lives the majority of the time. Absent such an explicit exception, however, the court considers its conclusion to be the most logical interpretation of the statute." Id. It is noteworthy that the legal settlement of the student was a side issue (see Linda W., *supra*, under **Judicial Decisions**) and was brought under the judicial review provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*. As such, the decision was not controlling law but is reserved to the facts of that case.

"Judgments" and the Debt Service Fund

In April of 1981, the federal district court that has jurisdiction over the interdistrict desegregation scheme involving the Indianapolis Public Schools and six of the township schools in Marion County entered a financing plan that established certain financial obligations but also created an administrative mechanism whereby the Indiana Department of Education and participating school districts could submit certain types of disputes to the State Board of Education rather than resort immediately to the federal court. There was no realistic opportunity to invoke this procedure until 1999, when the Indiana Department of Education initiated a hearing before the State Board within the relatively short time frame of the financing order although the parties were close to resolving the financing dispute. Indiana Department of Education and the MSD of Perry Township *et al.*, **Cause No. 9905009** (SBOE 2000). Although the parties eventually

[8] See "Guardianships for Educational Reasons," Recent Decisions 1-12: 1995.

reached an Agreed Administrative Judgment that was approved by the State Board on January 6, 2000, a side issue may prove to be the lasting legacy of this brief encounter.

I.C. 21-2-4-2(5) permits an Indiana public school corporation to utilize its debt service fund for the payment of "...all debt and other obligations arising out of funds borrowed to pay judgments against the school corporation [.]" The statutory definition for "judgment" at I.C. 1-1-4-5(9) defines this term as meaning "...all final orders, decrees, and determinations in an action and all orders upon which executions may issue." This definition is to be applied "to the construction of all Indiana statutes unless the construction is plainly repugnant to the intent of the general assembly or of the context of the statute[.]" The statutory definition of "judgment" is not confined to court orders, court decrees, or similar judicial determinations, but is dependent upon an "action and all orders upon which executions may issue." It would seem, then, that the statutory definition for "judgment" would include an administrative adjudication that is final and no longer subject to judicial review. However, the "Accounting and Uniform Compliance Guidelines Manual for Indiana Public School Corporations" issued by the Indiana State Board of Accounts restricts "judgment" to "court decisions." In consideration of the above, the Indiana Department of Education requested the State Board of Accounts to review its definition of "judgment."

The State Examiner responded that the State Board of Accounts would not take an audit exception to the Indiana State Board of Education exercising its adjudicative responsibilities to issue administrative adjudication that would be considered a "judgment" for the purpose of a school corporation utilizing its debt service fund to satisfy such a judgment. The State Examiner's letter is included as **Attachment C**.

Probationary Accreditation Status and Transfer Tuition

In 1997, the Indiana State Board of Education amended its transfer tuition rules in several particulars. One of the more significant changes was to create the possibility that a student could be granted a transfer from the student's public school where the public school did not have full accreditation. Probationary accreditation alone would be an insufficient basis to grant a transfer. The student's reason for wishing to be transferred would have to be related to the reason the school is not fully accredited. See 511 IAC 1-6-3(4). Accreditation is determined by the extent to which a school complies with certain legal standards, including standards for health and safety, minimum instructional time requirements, staff-student ratios, curriculum offerings, staff evaluation plans, beginning teacher internship programs, and school improvement plans. See I.C. 20-1-1.2-7 and 511 IAC 6.1-1 *et seq.*

The State Board recently addressed the first such case brought to it under the revised rules. In <u>In the Matter of Q.W. and the East Allen County Schools</u>, **Cause No. 9907016** (SBOE 2000), the student, a sixth grade student in the school district's middle school, was granted a transfer to a middle school in the neighboring public school district because of the probationary accreditation

status of his middle school.[9] The school district offered to transfer the student to one of its other middle schools, but the parent expressed concern over the demographics at the other middle schools because the student would become racially isolated.[10] Although the student associated the probationary accreditation status of the middle school with curriculum offerings, the public school district never explained why the middle school was accorded such a status, although there were three opportunities to do so (in denying the transfer request, in the hearing before the State Board's hearing examiner, and at oral argument before the State Board of Education). The school argued that its solution–offering to transport the student to one of its middle schools that was fully accredited–should have resolved the matter. The Hearing Examiner, noting the school did not shift the burden of proof back to the student on the issue of why the middle school was not fully accredited, recommended granting the transfer. The Hearing Examiner also noted that the remedy provided by the school was not a remedy provided by law such that a parent or student had to accept it.

This case resulted in considerable discussion before the State Board at its January 6, 2000, meeting. The State Board noted that it did not have the authority to order the remedy proposed by the school because the State Board does not have the authority to order intra-district transfers (see ***Interdistrict Transfers***, *supra*). One State Board member expressed concern that a ruling in favor of the transfer would provide a "free ticket out to any student." Another State Board member questioned why the school did not offer to transfer the student earlier, electing to wait until the dispute became a hearing issue. Eventually, the Board agreed that the student sufficiently stated reasons for why his request for transfer should be granted. The school did not rebut or otherwise shift the burden back to the student by showing the probationary accreditation status of the student's middle school was not related to any of the reasons for why the student was seeking a transfer. In the absence of such evidence, the presumption was in favor of the student, although State Board members reminded the parent and the student that the transfer is only for one year, as provided by 511 IAC 1-6-2, and that the middle school may be fully accredited by the next school year. The case was decided on its individual merits, State Board members added, and should not be read as creating an easier avenue for similar requests. The State Board's decision is included as **Attachment D**.

INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The following are important decisions of the Indiana Board of Special Education Appeals (BSEA)

---

[9]The student also sought transfer for curriculum reasons under 511 IAC 1-6-3(1), but this was denied because curriculum alone is only a consideration when the student is eligible to participate in secondary level courses. However, curriculum can be a consideration otherwise where this is one of the reasons the public school has not been fully accredited.

[10]The State Board of Education has declined in the past to use racial isolation as a basis for considering a request to transfer from one public school district to another. See "Minority Status and Transfer Tuition," Recent Decisions 1-12: 1993, discussing In Re T.R., **Cause No. 9209033** (SBOE 1993).

during 1999. None of the referenced decisions are attached. However, all decisions of the BSEA are available on-line through the Legal Section's web site. See <www.doe.state.in.us/legal/> and scroll to "Education Appeals' Decisions."

Expulsion Proceedings During Pendency of Administrative Review

In the Matter of D.S., the Lakeland School Corporation, and the Northeast Indiana Special Education Cooperative, 29 IDELR 1133 (BSEA 1999) **Article 7 Hearing No. 1063.98** began as a challenge to the school's conduct of the manifestation determination to assess causality between the complained-of activity (taking two drinks from a "spiked" root beer bottle) and the student's disability (learning disability). The school recommended expelling the student from school. The IHO found the school properly conducted the manifestation determination and that there was no causal relationship between the activity and the student's disability. Due to these findings, the IHO concluded the school could proceed with its expulsion of the student. However, the school expelled the student during the time either party could appeal the IHO's decision to the BSEA. The BSEA cited the school for violating state law by doing so. A request for a due process hearing, the BSEA noted, operates to stay any formal expulsion hearings until administrative proceedings are completed. "Although the order of the Independent Hearing Officer allowed the School to proceed with expulsion procedures in compliance with Indiana law, the expulsion of the Student prior to the completion of administrative procedures was not in compliance with Indiana law," the BSEA found at Combined Findings of Fact and Conclusions of Law No. 12. Although the BSEA upheld the IHO's determinations in favor of the school, it ordered the school to "provide inservice training to all administrators who are or may be involved in the discipline, suspension and expulsion of special education students concerning the requirements of Article 7 and IDEA in matters pertaining to suspension and expulsions."

Juvenile Court Jurisdiction and Least Restrictive Environment

In the Matter of L.W., Valparaiso Community School Corporation, and the Porter County Education Interlocal, 30 IDELR 1033 (BSEA 1999), **Article 7 Hearing No. 1037.98** involved, in part, the effect on the educational placement of a student when a juvenile court becomes involved. While the hearing was pending, the student, who attended the local middle school, set fire to a sweatshirt in the school building. The student was suspended by the school for five (5) days and was arrested. As a result, he came under the jurisdiction of the juvenile court.[11] The juvenile court issued an order excluding the student from attending the middle school. The school was not a

[11]The parent filed a separate complaint under 34 CFR §§300.660-300.662 with the Indiana Department of Education, Division of Special Education, when the school shared information from the student's educational record with law enforcement following the student's arrest. In Complaint No. 1332.98, the school district was found not to have violated federal law, specifically 20 U.S.C. §1415(k)(9)–now also found at 34 CFR §300.529–because the student's activity (setting fire to a sweatshirt in the school building) could reasonably be construed as a "crime" that the school could report to law enforcement. Under federal law, the school is permitted under such circumstances to transmit to appropriate law enforcement authorities relevant portions of the student's records.

party to the juvenile court proceedings. Although the hearing was pending, the Independent Hearing Officer (IHO) ordered the school to develop an interim placement. The parent wanted the student returned to the middle school after the suspension was completed. The student remained in the interim alternative educational setting for more than forty-five (45) days. The IHO determined that she did not have the authority, nor did the school, to reinstate the student in the middle school due to the juvenile court order. Following completion of the hearing, which took five days spread over two months, the parent assigned as error the IHO's determination that educational placements cannot be made where a court order prevents such determinations.

The BSEA found that the 45-day limitations on interim alternative educational settings (IAES), as found at 20 U.S.C. §1415(k), did not apply to this circumstance. The juvenile court had issued an order preventing the student from returning to school. Neither the IHO nor the school was in a position to countermand such an order. The interim placement was not made in order to comply with §1415(k) but to ensure the student would receive educational services during the time the juvenile court prevented him from attending the middle school. The IHO did not exceed her jurisdiction nor did she commit error when she ordered an interim placement while the hearing process was completed, especially in light of the juvenile court's order.

Manifestation Determination and Drug Possession

The BSEA reversed a decision by an IHO that supported the school's procedures for assessing causality between the student's disability and the complained-of activity (possession of marijuana). In the Matter of S.M., the Brown County School Corporation, and the Bartholomew County Special Services Cooperative, 31 IDELR ¶200 (BSEA 1999), **Article 7 Hearing No. 1077.98** involved a 17-year-old freshman who functioned in the low-average to borderline intellectual range. School assessments and observations conducted for the purpose of reevaluation identified the student as having learning and behavioral difficulties as well as a lack of appropriate judgment for someone his age. "While the Student may generally know right from wrong, he cannot always appropriately process the information and will seek the assistance of his parents for an appropriate response to situations he perceives as difficult." Combined Findings of Fact and Conclusions of Law No. 5. The facts were undisputed that the student had in his possession marijuana that had been given to him by another student who wished to avoid detection for possession of contraband. The student did not know what to do with the marijuana, so he put it in his wallet so when he arrived home, he could ask his parents what to do. This was known to be the student's usual means for addressing difficult situations. The school moved to expel the student. A functional behavior assessment (FBA) was conducted, but it failed to take into consideration information already known by the school, such as his lack of judgment skills and other behavior deficits due to his limited intellectual capacity. The BSEA reversed the IHO because the manifestation determination was flawed and because the school, although it was aware of his need for acquiring judgment skills and addressing his behavioral needs, never addressed these in his IEPs. The Board found that the behavior was a manifestation of the student's disability, thus preventing his expulsion for this incident. The school was also ordered to reconvene the student's case conference committee to address the student's behavioral needs and to address the acquisition of judgment skills.

Methodology

Increasingly, methodology is being inserted as a evidentiary concern in analyzing whether or not a public school district did, in fact, propose an appropriate program. Traditionally, methodology has been a domain of the public school, reserved to the exercise of its pedagogical discretion. Lachman v. Illinois State Board of Education, 852 F.2d 290 (7th Cir. 1988). However, where the disability of the student is more involved and the "educational benefit" more difficult to assess, administrative law judges and courts are looking more to the methodologies being employed. This has been particularly true with early childhood programming for children with autism or within the autism spectrum.

The Indiana Board of Special Education Appeals (BSEA) affirmed an Independent Hearing Officer's decision upholding the school's choice of methodology for a three-year-old student with autism. In the Matter of A.S. and Richmond Community Schools, 30 IDELR 208, 4 ECLPR ¶ 76 (BSEA 1999) **Article 7 Hearing No. 1055.98**.[12] When the child was two years old, the child was provided with weekly sessions with a developmental therapist, speech therapy, physical therapy, and twice weekly sessions of occupational therapy pursuant to an Individualized Family Service Plan (IFSP) under the First Steps Program. The parents also implemented an Applied Behavioral Analysis (ABA) program that was not part of the IFSP. At a transition conference, the parents requested the school provide discrete trial training by funding a 30 hours a week home-based ABA program.[13] The school had a trained autism team, and the school's proposed program incorporated the use of ABA and other techniques. The hearing officer determined that as long as the school offers a free appropriate public education (FAPE), it can choose the methodologies that will be used. The IHO noted that the student would likely experience some regression during the transition from the intensive in-home program to the school's proposed program, but the school's transition plan was calculated to provide educational benefit to the student. Although the parents

---

[12]The IHO's decision can be found at 29 IDELR 443 (SEA IN 1998). The parents sought judicial review of the BSEA's decision on April 5, 1999, in the Federal District Court, Southern Division, in Indianapolis, under Cause No. IP 99-C-0458. The case is still pending.

[13]In a footnote, the BSEA noted:

> A "discrete trial format" or "discrete trial training" is a series of distinct, repeated lessons with clear beginnings and endings. Multiple trials are repeated over and over again until the child demonstrates mastery. The training usually occurs in a one-to-one setting with as little distraction as possible. Positive reinforcement is used to encourage compliance with any task. Tasks are broken down into small, learnable segments (task analysis). Data collection and record keeping are an integral part of this method. The data indicate when the child should move on to new tasks. This is a form of behavior modification. There are variations of this practice, such as "Compliance Training," "Clinical Prescriptive Method," "Applied Behavioral Analysis," "Functional Analysis of Behavior and Positive Behavior Supports," "Priming," and "Lovaas," the latter named for O. Ivar Lovaas, the best-known practitioner of this method. See "Discrete Trial Training: Finding the Balance" (Donnelly, 1997) and "Lovaas Revisited: Should We Have Ever Left?" (Indiana Resource Center for Autism *Newsletter*, Vol. 8, No. 3, Summer 1995).

may prefer a different educational program or approach, the parents do not have the right to compel the school to provide a specific program or employ a specific methodology. The BSEA also upheld the IHO's determination that the parents were not entitled to be reimbursed nearly $13,000 they expended in implementing the in-home program while the administrative proceedings were pending.

There have been a number of similar cases reported across the country. The two most recent decisions in this area arose in Michigan and are remarkably similar to the A.S. case.

Renner v. Board of Education of City of Ann Arbor, 185 F.3d 635 (6th Cir. 1999) involved a dispute over whether the proposed program for a student with autism was adequate. The parents eventually, through an independent behavioral psychologist, were introduced to the Lovaas method, which stressed extensive and intensive home treatment with parental involvement. The parents advised the school of their intent to implement a discrete trial training (DTT) program in their home.[14] They also asked for a one-to-one aide to assist the student in his school-based program. The DTT program increased through the year from 10 hours a week to 25 hours a week. This increased to 35 hours a week at the recommendation of the behavioral psychologist. The school placed the student in a new program for the 1995-1996 school year. The new program incorporated some DTT direction, but not at the intensity of the home-based program. The parents and the school disagreed as to the intensity of the school program and the necessity for one-to-one assistance. The parties met in December of 1995, but the parents disagreed with the proposed IEP, which the behavioral psychologist found inadequate. The parents also asked to have the behavioral psychologist reimbursed for independent evaluations. The behavioral psychologist recommended the IEP call for 40 hours a week of DTT, divided between the home and the school, an extended school year, weekly team meetings, staff training in DTT, and recorded trial-by-trial data on the student's DTT responses, and "appropriate opportunities for interaction with non-handicapped peers." At trial, the behavioral psychologist testified that the "Lovaas-style" package of DTT programs "is the only available intervention for young children with Autism and related disorders which has been subjected to an empirical outcome study with strong positive findings." At 640. The school and its expert testified that some DTT would be appropriate. The hearing officer, at the administrative level, found for the student. The review officer reversed, and

[14]The court adopted the trial court's definition for DTT as "a form of behavioral modification, based upon a correlation of very intensive, repetitive, requests or stimuli, followed rapidly and consistently with reinforcement with desirable consequences (candy, strawberries, juice, a tickle–for appropriate response), or with negative consequences (for improper responses), or with loud redirection (if the child's attention wanders or he resorts to self-stimulatory behavior)... It emphasizes early intervention, heavy parental involvement, and treatment in the home or elsewhere in the community, rather than in professional (school or clinical) settings. Each trial consists of giving the child a discrete instruction (such as 'stand up,' 'look at me,' 'touch nose,' 'what is your name,' 'what is this,' 'what is the boy doing,' 'say Daddy,' identifying colors, shapes, big vs. small, etc.), waiting for a response, and then providing an appropriate (positive or negative consequence. A single trial can last as little as 30 seconds if the child responds properly, but much longer if the trainer has to wait for the correct response." Renner, 185 F.3d at 638, note 4.

the trial court upheld the review officer. The 6th Circuit affirmed the trial court, finding the school personnel were sufficiently familiar with the DTT methodology and the student's needs, and the decision to incorporate only a part of that program was appropriate. The trial court determined–and the 6th Circuit agreed–that "[t]here is nothing in the record to indicate that there was anything unique about [the student's] autism." At 643. The IEP was sufficiently specific and appropriate, and the program recommended by the behavioral psychologist (40 hours a week, one-to-one DTT) "was her usual and customary program for all young autistic children with general needs commensurate with this problem, and not geared to [the student] specifically." Id.

Dong v. Bd. of Education of Rochester Community Schools, 197 F.3d 793 (6th Cir. 1999) also involved a child with autism. The parent disagreed with the proposed IEP and sought reimbursement for an intensive Lovaas-style DTT home-based program. The same behavioral psychologist in Renner became involved with this student. A 40-hour a week, one-to-one program was recommended as appropriate. The school offered a 27.5 hour a week program with a small staff ratio, a mix of one-to-one, interaction and mainstreaming opportunities along with a functional language-based program. The school prevailed at both hearing levels, at the trial, and on appeal. The 6th Circuit noted that a public school provides a FAPE when it complies with special education procedures, and the resulting IEP is reasonably calculated to enable the child to receive educational benefits. Although procedural compliance is a prerequisite to determining that a FAPE has been provided, technical deviations from established procedures will not render an IEP invalid. At 800, 802. Although the team that develops the IEP is to have "persons knowledgeable about the child, the meaning of the evaluation data, and the placement options," quoting generally 34 CFR §300.344(a) and 34 CFR §300.533(a) of IDEA, this does not mean "the District must include an expert in the particular *teaching method* preferred by the parents in order to satisfy the requirement that the [IEP Team] include person knowledgeable about 'placement options.'" At 801, emphasis original. Notwithstanding the parental preference for a teaching method and the school's disinclination to involve the parent's "experts," the court found the school personnel were well qualified in the area of autism.

Reimbursement for Private School Placement

In the Matter of L.N., the Greater Clark County Schools, and the Greater Clark County Special Education Cooperative, 30 IDELR 489 (BSEA 1999) **Article 7 Hearing No. 1039.99**, involved claims for reimbursement by the parents for educational services privately obtained for their child who had severe dyslexia. A three-day hearing was conducted, after which the IHO found against the school district, ordering it to reimburse the parents for the private school program, ordering two years of compensatory educational services to be delivered at the private school,[15] and

[15]The IHO's order stated that the public school could provide the compensatory educational services itself, but only after it could "demonstrate by clear and convincing evidence to the Indiana Division of Special Education that [the school] can successfully teach a dyslexic student within the [school] environment..." The BSEA, for the purpose of review, interpreted "clear and convincing evidence" to mean that school staff received "appropriate teacher training in the concepts of teaching dyslexic students."

ordering the school to include representatives of the private school in all future case conference committee meetings. The BSEA, by 2-1 , reversed the IHO, finding the parents were not entitled to reimbursement because of their failure to comply with the notice provisions of 20 U.S.C. §1412(a)(10)(C)(i)-(iv), which limits reimbursement for unilateral private school placements. The BSEA found the parents had been provided notice by the school district regarding their respective rights and obligations, including the obligation to notify the school of their intent to place the student unilaterally in a private school and seek reimbursement. Although the parents were aware of this, they continued to negotiate with the school after they had already placed the student unilaterally during a summer program with the intent to seek reimbursement. Because the parents were aware of this requirement and did not do so, the BSEA, in exercising its discretion under the federal provision, denied reimbursement and compensatory educational services. The BSEA also found the school did provide a free appropriate public education in the least restrictive environment to the student and that the Individualized Education Program (IEP) designed for the school year in dispute was calculated to provide the student with educational benefit. The parents have sought judicial review. The case is pending in the Federal District Court, Southern District, under **Cause No. NA-99-C-0096-H/G.**

Wiretapping

In the Matter of K.K., New Prairie United School Corp., and the Indiana Department of Education, 30 IDELR 346 (BSEA 1999), **Article 7 Hearing No. 1062.99**, involved a dispute over the appropriate educational program for a student who required residential placement out of state in order to receive a free appropriate public education. The hearing was noteworthy for several reasons: (1) it was the first hearing ever requested by the Indiana Department of Education (IDOE), although the IDOE had intervened in previous hearings and has been the subject of such hearings; (2) it was the first hearing involving the issue of a student in residential placement participating in the statewide assessment (Indiana Statewide Testing for Educational Progress or ISTEP+), including the Graduation Qualifying Examination (GQE) that is a prerequisite to receiving an Indiana diploma; and (3) it was the first time an exhibit was rejected by the BSEA based upon alleged violations of federal and state laws against wiretapping.

During the hearing phase, the Independent Hearing Officer (IHO) conducted a pre-hearing conference under I.C. 4-21.5-3-19 in order to discuss the purpose of the hearing and to establish the issues. Because the IHO, the parties and their representatives were located in various parts of the state, the pre-hearing conference was conducted by telephone, as permitted by I.C. 4-21.5-3-19(b). Unknown to the IHO, the School, and the IDOE, the parents of K.K. tape-recorded the pre-hearing conference, although this would have likely been permitted by the IHO if leave to do so had been sought. The IHO prepared a written pre-hearing order following the pre-hearing conference, to which no party took exception. The hearing was conducted over a three-day period. The parents sought review of the IHO's written decision. However, submitted with their Petition for Review was an audiocassette purporting to be a tape recording of the pre-hearing conference conducted by the IHO. The Indiana Department of Education filed a Motion to Strike the tape-recording based, in part, on possible violations of 18 U.S.C. §2501 *et seq.* of Title III, Omnibus Crime, Control and Safe Streets Act, as well as Indiana's Interception of telephonic or

Telegraphic Communications Act, I.C. 35-33.5-1 *et seq.* IDOE, in its Motion, which the School joined in, argued the tape-recording should be struck from the record because it was a "surreptitious interception" that the parents should have known violated the law. However, IDOE added, ignorance of the law should not be a defense that would permit the admission of the tape recording:

> [I]gnorance of the law is no defense in a civil proceeding. *Fultz v. Gilliam*, 942 F.2d 396 (6th Cir. 1991), where the court found a former husband potentially liable for monetary damages to his former wife when he played a tape to his daughter of a recorded telephone conversation between his former wife and her boyfriend. This violated the statute prohibiting disclosure of improperly obtained evidence. The court rejected ignorance of the law as a defense for playing the illegally obtained tape-recorded conversation.

Following oral argument, the BSEA found the tape-recording should be excluded from the record because no notice was provided to the IHO or the parties that such a recording was going to be made; no objections were made either to the conduct of the pre-hearing conference or the subsequent pre-hearing order, thus any objections were waived on appeal; the pre-hearing order is a part of the official record subject to review by the BSEA; and "The parents' secret recording of this conference is not admissible on appeal." BSEA's Combined Findings of Fact and Conclusions of Law Nos. 2, 3, 4, and 5. 30 IDLER at 350. Accordingly, the BSEA granted the IDOE's and School's Motions to Strike the parents' tape-recording of the pre-hearing conference. Order No. 1, 30 IDELR at 351.[16]

Although the BSEA did not find–nor was it asked to find–that wiretapping laws had been violated, this was not the case in Peavy v. Dallas Independent School District, 57 F.Supp.2d 382 (N.D. Tex. 1999). Peavy had been a member of the school's Board of Trustees. An anonymous person sent an audiotape to other members of the board that contained intercepted conversation between Peavy and other individuals wherein Peavy used a number of racial slurs and highly offensive and demeaning epithets in reference to African-Americans, fellow board members, and candidates seeking to become board members. School district staff transcribed the tape and gave the transcript to the board. At the next board meeting, board members read into the record the transcript. Peavy did not attend the meeting, but was not prevented from doing so. He later resigned. The transcript was subsequently provided to the media.[17] Peavy sued the board for alleged violations of the Federal Wiretap Act (see *supra*) and his right to privacy. The court granted the board's Motion for Summary Judgment, finding that Peavy failed to establish the facts necessary to demonstrate a violation of federal law. To prevail, Peavy would have to show that board members knew they were disclosing or using information from an intercepted

---

[16]For an interesting article on wiretapping, see "Wiretapping Pitfalls: When A Client Presents You with a Tape," by Barbara Richards Campbell, in *Res Gestae*, Vol. 39, No. 10 (April 1996). *Res Gestae* is a publication of the Indiana State Bar Association.

[17]See Peavy v. New Times, Inc., 976 F.Supp. 532 (N.D. Tex. 1997).

communication, and that the board members knew that the parties to the intercepted communication had not consented to the interception (a "disclosure and use" claim). 18 U.S.C. §2511(1)(c),(d). Peavy never told the board, prior to the board's disclosure, that the tape contained illegally intercepted communications, and Peavy has never indicated he thought the board members were aware the communications had been illegally obtained prior to the board's disclosure. Also, although the taped conversation involved Peavy and another individual, there were other individuals present during the conversations that were taped. Also, the board did not violate Peavy's privacy rights, as embodied in the Fourth Amendment, because the tape-recording of his conversation was not made by the state or any agent of the state. In fact, the conversation was illegally intercepted and recorded by his next-door neighbor.[18] The illegal activity involved private citizens, and "there is [no] federal constitutional right to privacy among private citizens." 57 F.Supp.2d at 389. The Fourth Amendment, rather, is designed "to protect the privacy interests of citizens against arbitrary or unwarranted intrusion or interference by the government or its officials." Id. The subsequent actions of the board by reading the transcript into the board's record and releasing it to the media did not convert this to a constitutional deprivation. At 389-90, 392.

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

[18]See Peavy v. Harman, 37 F.Supp.2d 495 (N.D. Tex. 1999).

RECENT DECISIONS
INDEX THROUGH 1-12: 99

Recent Decisions, **Quarterly Reports**, and decisions of the Indiana Board of Special Education Appeals are available on-line at *www.doe.state.in.us/legal/.*

BEFORE THE INDIANA
STATE BOARD OF EDUCATION

In Re the Matter of:	)	
C.H. and J.H.	)	
	)	**Cause No.: 9811029**
Appeal of Expulsion Pursuant to	)	
IC. 20-8.1-5.1-11	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

On November 19, 1998, the Students' mother sent her request forappeal of the expulsion of her daughters, C.H. and J.H., to the Indiana State Board of Education. The Students had been ordered expelled due to lack of legal settlement within the school district of the M.S.D. of Washington Township. The undersigned was appointed as hearing officer on November 20, 1998, and sent notice of such appointment to the parties. The hearing officer requested the parties to notice the hearing officer of available dates to conduct a review hearing in this matter, and also directed the school to submit the record of the expulsion proceedings. The parties agreed upon the date of December 10, 1998, for the hearing. The hearing officer received the record of the proceedings prior to the hearing date.

The Students have been attending school within the M.S.D. of Washington Township since August, 1993, when they moved into the school district. In September, 1998, the school became aware that the Students' mother did not reside within the boundaries of the school district and instituted expulsion proceedings. An expulsion meeting was held on September 24, 1998, and the written decision of the expulsion examiner was issued on October 1, 1998. The expulsion examiner determined that the Students have resided with their grandparents within the boundaries of the M.S.D. of Washington Township since August, 1993. This fact was farther documented by a letter from the assistant manager of the apartment building where the grandparents reside. The Students were both listed as occupants on the application for occupancy in August, 1993. The mother resides outside of the school district. Although the grandparents do not have guardianship, the mother and grandmother are not opposed to the grandparents obtaining legal guardianship. The expulsion examiner determined that this matter be resolved by the grandparents making arrangements to proceed with guardianship proceedings and to provide the school with copies of their efforts by October 10, 1998. The guardianship was to be in place by November 15, 1998, unless the court indicated in writing reasons for the delay. The mother was to keep the school informed of her address and phone number.

On November 2, 1998, the expulsion examiner sent a letter to the mother indicating that the only item received was a letter from Legal Services Organization of Indiana, Inc., indicating that the mother had gone to their office for legal representation and that it would be 7 to 10 working days before she received a response. The expulsion examiner informed the mother that unless the school received paperwork by November 5, 1998, indicating that guardianship is in process, the expulsion will go into effect immediately and the Students will be withdrawn from Westlane Middle School.[19] On November 4, 1998, the mother submitted her appeal of this determination to the M.S.D. of Washington Township. The local school board, at its meeting of December 11, 1998, declined to hear the appeal. This appeal to the Indiana State Board of Education followed.

Present for the hearing were Diana Bryant, the Students' mother; Shirley Bryant, the Students' grandmother; Gerald Wagner, Director of Student Programs, M.S.D. of Washington Township; and Anita Franklin, Home School Counselor, M.S.D. of Washington Township.

FINDINGS OF FACT

1. C.H. is fourteen years old and is attending Westland Middle School, M.S.D. of Washington Township. Prior to attending the middle school, C.H. attended Fox Hill Elementary School, which is also in the school district of M.S.D. of Washington Township.

2. J.H. is thirteen years old and is attending Westland Middle School, M.S.D. of Washington Township. Prior to attending the middle school, J.H. attended Fox Hill Elementary School, which is also in the school district of M.S.D. of Washington Township.

3. Both Students began attending school in the Washington Township school district beginning in the fall of 1993.

4. Both Students have lived with their grandparents since their births.

5. Prior to August, 1993, the Students resided with their grandparents within the district boundaries of the Indianapolis Public Schools. The Students attended I.P.S. schools from their initial enrollment in school until moving to the Washington Township school district in August, 1993.

6. In the application for their apartment in August, 1993, the grandparents listed the Students as occupants of the apartment. The assistant apartment manager has verified the Students have resided in the apartment with their grandparents since 1993.

7. The Students' mother currently resides in a one-bedroom apartment within the school district of

[19]Both Students remain enrolled at Westlane Elementary School and have been attending school throughout this process. At the hearing on December 10, 1998, the school indicated its willingness to allow the Students to remain enrolled throughout the appeal process.

M.S.D. of Wayne Township. During the course of the past fourteen years, the mother has resided in various locations and at times moved in and out of her parents' home.

8. The grandparents have provided the everyday care and support for the Students throughout their lives.

9. The grandparents claim the Students as dependents on their tax return.

10. The mother contributes to the support of the Students by buying clothes.

11. The Students have always lived with their grandparents and do not want to live with their mother. The mother does not have room in her apartment for the Students, nor does she have the rapport or normal relationship of mother/daughter with the Students. The mother states she is unable to adequately provide for their needs.

12. Since the expulsion meeting conducted by Washington Township, the mother contacted Legal Services Organization, Inc., for assistance in having her parents appointed as guardians for her children.

13. The mother was advised by an attorney that she would need to obtain the written consent of the children's father in order to have the grandparents appointed as guardians. The mother and the children's father were never married and his current whereabouts are unknown.

14. On October 8, 1998, the mother and grandmother executed a Third-Party Custodial Statement and Agreement for each Student. The mother signed acknowledging the Students are residing with the grandmother, who is supporting and caring for the Students, and the Students were not placed with the custodian for the primary purpose of attending school in the school corporation of the custodian's residence. The grandmother also signed agreeing to assume all duties, responsibilities, obligations and liabilities of the parent with respect to dealing with the school and for all other purposes under Indiana Code 20-8.1.

CONCLUSIONS OF LAW

1. Pursuant to md. Code º 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter.

2. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such. Any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

3. Indiana Code 20-8.1-6.1-l(a)(3) provides as follows:

Where the legal settlement of a student, in a situation to which

> subdivision (1) otherwise applies, cannot reasonably be determined, and the student is being supported by, cared for by, and living with some other person, the legal settlement of the student shall be in the attendance area of that person's residence, except where the parents of the student are able to support the student but have placed him in the home of another person, or permitted the student to live with another person, primarily for the purpose of attending school in the attendance area where the other person resides. The school may, if the facts are in dispute, condition acceptance of the student's legal settlement on the appointment of that person as legal guardian or custodian of the student, and the date of legal settlement will be fixed to coincide with the commencement of the proceedings for the appointment of a guardian or custodian. However, if a student does not reside with the student's parents because the student's parents are unable to support the child (and the child is not residing with a person other than a parent primarily for the purpose of attending a particular school), the student's legal settlement is where the student resides, and the estabhshment of a legal guardianship may not be required by the school. In addition, a legal guardianship or custodianship established solely for the purpose of attending school in a particular school corporation does not affect the determination of the legal settlement of the student under this chapter.

4. The Students have resided with and been cared for and supported by their grandparents since their birth. The legal settlement of the Students is in the attendance area of their grandparents' residence, which is the M.S.D. of Washington Township.

DISCUSSION

When a student is being supported by, cared for by, and living with a person other than the parent, the student's legal settlement is generally in the attendance area of that person's residence except in situations where the parents are able to support the student but have placed the student in the other person's home primarily for the purpose of attending school in the attendance area where the other person resides. If the facts are in dispute, the school may condition acceptance of the student's legal settlement on the appointment of that person as legal guardian. In this case, the expulsion examiner conditioned acceptance of the Students' legal settlement on the appointment of the grandparents as legal guardians. However, there was no indication of a real dispute of the facts. The Students have always resided with the grandparents. They were initially placed in their grandparents care at birth at a time when the grandparents resided within the attendance area of I.P.S. No facts exist to infer the Students were placed with the grandparents primarily for the purpose of attending school within the M.S.D. of Washington Township or 6f any other particular school. When the grandparents moved in 1993, the Students moved with them.

Indiana Code 20-8.1-6.1-1(c) requires the Superintendent of Public Instruction to prepare forms to

be used in certain enumerated situations, including the situation occurring under I.C. 20-8.1 - 6.1-l(a)(3). This form, the Third-Party Custodial Statement and Agreement, has been executed by the mother and grandmother. Neither the facts as found by the expulsion examiner nor this hearing officer give any cause to legitimately question the statements contained therein. Petitioners have met the requirements of I.C. 20-8.1-6.1 - 1 for the establishment of legal settlement within the M.S.D. of Washington Township.

ORDER

The decision of the school's expulsion examiner is hereby reversed. The Students, having legal settlement within the M.S.D. of Washington Township, shall not be expelled.

Dated: December 17 1998

/S/ Dana L. Long
Dana L. Long, Hearing Officer for the
Indiana State Board of Education

INDIANA STATE BOARD OF EDUCATION ACTION

On February 4, 1999, the Indiana State Board of Education adopted the decision of the hearing officer by unanimous vote.

BEFORE THE INDIANA
STATE BOARD OF EDUCATION

Cause No. 9905010

Mrs. M.H., and Vincennes Community School Corporation and South Knox School Corporation	)	
	)	FINDINGS OF FACT,
Legal Settlement concerning C.G. Under IC. 20-8.1-6.1-1 and IC. 20-8.1-6.1-10(a)	)	CONCLUSIONS OF LAW, AND ORDERS

Procedural History

The legal settlement of C.O. is in dispute. Petitioner, Mrs. M.H., is the mother of C.G. On May 24, 1999, Petitioner filed a letter with the State Board of Education (SB OE), appealing the legal settlement determination of C.G. by Respondent, Vincennes Community School Corporation (hereafter, Respondent Vincennes), that C.G.'s legal settlement was in Co-Respondent South Knox School Corporation's district. Respondent Vincennes held a hearing on February 25, 1999 at Respondent Vincennes' middle school. Respondent Vincennes' Hearing Officer determined that C.O. '5 legal settlement was in South Knox district and stated that "[t]his is in accordance with Indiana Code 31-6-4-18.5." [20] The SBOE's hearing examiner was appointed on May 24, 1999. On May 26, 1999, the hearing examiner sent a Notice of Appointment of Hearing Examiner to Mrs. M.H., Vincennes Community School Corp., and South Knox School Corp.

On July 7, 1999, the hearing examiner notified the parties that a hearing on this matter would be conducted on August 31, 1999, which was a date mutually agreeable to the parties. On August 23, 1999, Vincennes Community School Corp. filed with the SBOE a witness and exhibit list which included copies of exhibits. On August 26, 1999, Petitioner filed a motion to continue the hearing date scheduled for August 23, 1999. On August 26, 1999, the hearing examiner issued an order granting the motion for a continuance. On September 2, 1999, Respondent Vincennes requested that the father of C.G., Mr. M.G., be subpoenaed to appear at the hearing. On September 21, 1999, the hearing examiner notified the parties that a hearing on this matter would be conducted on November 9, 1999, which was a date mutually agreeable to the parties. On September 21, 1999, the hearing examiner issued a memorandum to Respondent Vincennes and attached the subpoena

[20] Legal settlement is defined at I.C. 20-8.1-1-7.1. The statute for determining legal settlement in this case is to be found at I.C. 20-8.1-6.1-1 and not I.C. 31-&4-18.5.

that had been requested by Respondent Vincennes. Copies of the hearing examiner's September 21, 1999 memorandum were sent to Petitioner, Mrs. M.H., and South Knox School Corporation (hereafter, Respondent South Knox). The hearing examiner's September 21, 1999 memorandum stated that: the party requesting the subpoena has the responsibility to ensure service of subpoenas and is responsible for the payment of witness fees; and witnesses are not usually separated; however, a party can request that witnesses be separated. On October 25, 1999, Respondent Vincennes filed its revised witness and exhibit list, which included copies of exhibits. On November 4, 1999, Petitioner, Mrs. M.H., filed a letter by facsimile transmission with the SBOE which indicated that she had paid tuition for the months of September and October 1999.

The hearing was held on November 9, 1999. A prehearing conference preceded the hearing, during which time the hearing procedures were discussed. Present for the prehearing conference and hearing was the Petitioner, Mrs. M.H.; the father of C.G., Mr. G.; the stepfather of C.G., Mr. H.; Dr. Dennis Brooks, Superintendent of Respondent Vincennes; Mr. Thomas Mandon, Business Manager of Respondent Vincennes; Ms. Donna Cozart, Attendance Officer of Respondent Vincennes; and Mr. Dennis Query, Principal of Respondent Vincennes' middle school. Respondent South Knox was not present at the prehearing nor at the hearing. The tape recorder at Respondent Vincennes' local hearing on February 25, 1999, malfunctioned so that on appeal there was not tape-recorded for the SBOE's hearing examiner to review. Respondent Vincennes Hearing Officer's written decision and other documents were available for review. At the November 9, 1999 hearing, the following exhibits were admitted into the record to supplement the record:

R- 1 Letter to Mrs. M.H. from Thomas G. Mandon, Business Manager, Vincennes Community School Corporation, dated March 19, 1999.
R-2 Letter to Mrs. M.H. from Harry Nolting, Hearing Officer, Vincennes Community School Corporation, dated March 25, 1999.
R-3 Letter to Mrs. M.H. from Dennis E. Query, Principal of George Rogers Clark Middle School, Vincennes Community School Corporation, dated February 10, 1999.
R-4 Letter to Dr. Dennis Brooks from Harry Nolting, Hearing Officer, Vincennes Community School Corporation, dated February 26, 1999.
R-5 Letter to Mrs. M.H. from Harry Nolting, Hearing Officer, Vincennes Community School Corporation, regarding the February 25, 1999 hearing.
R-6 Letter from Madonna J. Williams, Treasurer, Vincennes Community School Corporation, dated October 18, 1999.
R-7 Enrollment Card, Vincennes Community Schools for C.G., Grade 6, date entering, August 19, 1997
R-8 Enrollment Card, Vincennes Community Schools for C.G., Grade 7, date entering, August 18, 1998.
R-9 Enrollment Card, Vincennes Community Schools for C.G., Grade 8, date entering, August 17, 1999.
R-10 Vincennes Community School Corporation, Transfer Tuition Statements for C.G. for 1997-98 and 1998-99 school years.
R-1 1 Duplicate Enrollment Card, Vincennes Community Schools for C.G., Grade 6, date entering, August 19,1997.

R-12 Cash Receipt, dated September 1997 showing $189.00 received from Mrs. M.H.

The issue to be determined at this hearing was the legal settlement of the student. After consideration of the testimony and exhibits, the following findings of fact, conclusions of law, and order are made.

FINDINGS OF FACT

1. C.G. is an eighth grade student who has attended Respondent's schools. Mrs. M.H. paid transfer tuition for C.G. from third grade through fifth grade based on the fact that she lived in South Knox School Corporation's district.

2. On or about September 1997, Mrs. M.H. paid one-hundred and eighty-nine dollars ($189.00) for September 1997 tuition.

3. On or about the beginning of grade 6, the father of C.G., Mr. M.G., and the mother of C.G., Mrs. M.H., obtained joint custody of C.G.

4. Mr. M.G. resides within the attendance area of Respondent Vincennes.

5. Mr. M.G. testified that his work schedule is such that he does not return home from work until about 2 a.m., and as a result, his son does not spend time with him on school days.

6. C.G. spends time with his father on some weekends during the month, but this depends on his father's work schedule.

7. C.G. lives with his mother on school nights and his mother transports him to school. C.G. lives with his mother on some weekends.

8. Mrs. M.H. resides within the attendance area of Respondent South Knox.

9. Mrs. M.H. testified that she could not let C.G. stay with his father when his father comes home at 2 a.m.

10. On or about January 13, 1999, the Judge of the Knox Superior Court II signed a modification order which stated in rhetorical paragraph 1: "Joint Custody: The petitioner and respondent shall enjoy Joint Legal Custody of [C.G.] born August21, 1985 pursuant to Indiana Code 31-1-11.5-21(f). This Order recognizes that [C.G.], for approximately one (1) year now, has been sharing residency with both his mother and his father."

11. On or about January 13, 1999, the Judge of the Knox Superior Court II signed a modification order which stated in rhetorical paragraph 4: "School: The primary purpose of the parties' agreement and the resulting order of this Court is to satisfy residency requirements established

by the Vincennes Community School Corporation."

12. On or about February 26, 1999, Respondent Vincennes' Hearing Officer determined that C.G.'s legal settlement was in Respondent South Knox's school district.

13. Mrs. M.H. filed an appeal letter with the SBOE on May 24, 1999, appealing the legal settlement determination of C.G. by Respondent Vincennes.

14. Mrs. M.H. made two tuition payments in October and November 1999. At the hearing on November 9, 1999, Mrs. M.H. testified that C.G. is now living more with his mother and he goes to his father's home when he can.

15. Respondent's Transfer Tuition Statement for C.G. shows transfer tuition owed for C.G. for the 1997-98 school year to be one-thousand three-hundred and eighty-three dollars and nineteen cents ($1,383.19).

16. Respondent's Transfer Tuition Statement for C.G. shows transfer tuition owed for C.G. for the 1998-99 school year to be one-thousand six-hundred and sixteen dollars and seventy cents ($1,616.70).

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such, and any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

2. I.C. 20-8.1-6.1-10(a)(3)(A),(C) confers jurisdiction upon the Indiana State Board of Education to hear all disputes involving legal settlement as well as the right to attend school in any Indiana public school corporation. The State Board has jurisdiction to decide this matter.

3. I.C. 20-8.1-6.1-1, which sets forth the applicable standards for determining a student's legal settlement, states in relevant part:

> (a) The legal settlement of a student shall be governed by the following provisions:
> (1) If the student is under eighteen (18) years of age, or is over that age but is not emancipated, the legal settlement of the student is in the attendance area of the school corporation where the student's parents reside.
> (2) Where the student's mother and father, in a situation otherwise covered in subdivision (1), are divorced or separated, the legal settlement of the student is the school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations:
>
> > (A) Where no court order has been made establishing the custody of the student.
> > (B) Where both parents have agreed on the parent or person whom the student will live.
> > (C) Where the parent granted custody of the student has abandoned the student. In

the event of a dispute between the parents of the student, or between the parents and any student over eighteen (18) years of age, the legal settlement of the student shall be determined as otherwise provided in this section.

4. Residence for legal settlement and transfer tuition purposes is defined at I.C. 20-8.1-6.1 - 1(b). IC. 20-8.1-6.1-1(b) reads as follows:

   (b) The words "residence", "resides", or other comparable language when used in this chapter with respect to legal settlement, transfers, and the payment of tuition, means a permanent and principal habitation which a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose. These terms are not synonymous with legal domicile. Where a court order grants a person custody of a student, the residence of the student is where that person resides.

5. The student's permanent and principal habitation is with his mother whose residence is located in the attendance area of Respondent South Knox's school district.

6. Respondent Vincennes' determination that C.G. has legal settlement in Respondent South Knox's school district should be upheld.

DISCUSSION

I.C. 20-8.1-6.1 provides for transfer tuition and legal settlement but the statute does not explicitly address joint custody. This is the first time that the SBOE has been asked to rule on a legal settlement dispute where divorced parents have joint custody and there is disagreement as to where the student's legal settlement lies. The SBOE can look to the same kind of evidence of daily living activities that it must consider in legal settlement cases involving guardianships.

The SBOE has addressed guardianships established for educational purposes. See In Re A.S.C. and J.F.O. and the Tippecanoe School Corn., Cause No.9410026 (SBOE 1995), upholding a guardianship silent as to educational provisions, and In Re H.W. H.H. J.H. and Z.H. and New Prairie United School Corp., Cause No 9601001 (SBOE 1996), refusing to recognize a guardianship established solely or primarily for educational reasons because such guardianships are proscribed by statute. See I.C. 20-8.l-6.l-l(a)(3). In this case, it is not a guardianship but a joint custody determination attempting to establish legal settlement. However, only a juvenile court under specific conditions can determine the legally binding legal settlement for a student. See I.C. 20-8.1-6.1-l(a)(7)(A)(iii). A civil court exercising judicial review of a SBOE decision may do so under I.C. 20-8.1-6.1-10(e). The court determining joint custody in this case did not have jurisdiction to determine the leg~l settlement of C.G. such that it would he legally binding on the Respondent school corporations or, by extension, the Indiana State Board of Education. Even though the parents in this case have joint custody of the student, the facts show that during the school week he resides with his mother; therefore, legal settlement is with his mother.

ORDERS

1. C.G. has legal settlement within the attendance area of Respondent South Knox's school district.
2. C.G. does not have legal settlement within the attendance area of Respondent Vincennes' school district.

Date: November 24 1999

/s/ Valerie Hall
Valerie Hall, Hearing Examiner
Indiana Department of Education

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of January 6, 2000, adopted the recommended decision of the Hearing Examiner by a unanimous vote.

September 16, 1999
File: State - Schools

Mr. Kevin C. McDowell, General Counsel
Indiana Department of Education
229 Statehouse
Indianapolis, IN 46204

RE: Debt Service Funds/Judgments

Dear Mr. McDowell:

Thank you for your letter which was received on September 14, 1999 concerning your interpretation of the word "judgment" as provided in I.C. 21-2-4-2 and I.C. 1-1-4-5. You state in part concerning disputed claims "one of these claims involves the participating school corporations in the RISE Special Services Cooperative and arises from disputed claims related to the interdistrict desegregation scheme. Pursuant to the 1981 financing order of the federal district court, the Indiana Department of Education timely initiated a hearing before the Indiana State Board of Education when the disputed claims could not be resolved within thirty (30) calendar days. The parties are now at a stage where the claims can be resolved. Because the Indiana State Board of Education presently has jurisdiction, the parties could agree to a judgment resolving the claims. This judgment would be an administrative adjudication..."

Traditionally, the State Board of Accounts has not taken audit exception to court decisions which mandate payments from a debt service fund in accordance with I.C. 21-24-2(5) which states in part "all debt and other obligations arising out of funds borrowed to pay judgments against the school corporation..." The brief synopsis in the Chart of Accounts is intended to be reflective of that audit position. However, we would not take audit exception to the Indiana State Board of Education formally issuing an "administrative adjudication" for which you state "I believe, would be encompassed by the statutory definition of 'judgment' and permit the public school corporations to utilize their debt service funds to satisfy' the judgment."

We trust the aforementioned audit position of the State Board of Accounts answers your inquiry.

Sincerely,

Charles Johnson, III, C.P.A.
State ~miner

CWN/SAM/jas

cc: Data File

BEFORE THE INDIANA
STATE BOARD OF EDUCATION

Cause No. 9907016

In the Matter of Q.W. and	)	
East Allen County Schools,	)	
	)	FINDINGS OF FACT,
Transfer Tuition Dispute Under	)	CONCLUSIONS OF LAW
I.C. 20-8.1-6.1-2 and	)	AND ORDER
511 IAC 1-6-3(1) Curriculum and	)	
511 IAC 1-6-3(4) Accreditation	)	

Procedural History

Petitioner Q.W. submitted a Transfer Request Application prior to April 1, 1999 to the East Allen County Schools (hereafter, Respondent) seeking the payment of transfer tuition to the Fort Wayne Community Schools (hereafter, transferee). Petitioner requested a transfer for curriculum and accreditation reasons for the 1999-2000 school year. The application was misplaced at Respondent's administration office. As a result, Petitioner had to submit another transfer request, which was dated July 15, 1999. On or about July 22, 1999, Respondent denied the transfer request but offered to provide Petitioner with transportation to any of Respondent's junior high schools or middle schools. Respondent also stated that the curriculum, ISTEP score results and student-to-teacher ratio equals or exceeds those of the transferee's Lakeside Middle School.

On July 27, 1999, Petitioner submitted his Transfer Appeal to the Indiana State Board of Education (SBOE). The hearing examiner was appointed on July 29, 1999. On August 3, 1999, the hearing examiner sent a Notice of Appointment to the parties. On September 21, 1999, the hearing examiner notified the parties that a hearing on this matter would be conducted on October 27, 1999, which was a date mutually agreeable to the parties.

The hearing was held on October 27, 1999. A pre-hearing conference preceded the hearing, during which time the hearing procedures were discussed. Present for the pre-hearing conference and the hearing was the mother of Petitioner Q.W., Mrs. W.; the grandmother of Petitioner, Ms. B.; and Mr. Robert Rohrbacher, Director of Employee Relations for Respondent.

At the hearing, the following exhibits were admitted into the record:
P-1 Letter from Mr. Robert Rohrbacher, East Allen County Schools, and Transfer Request

Application, dated July 15, 1999.

R-1 1998-1999 New Haven Middle School's ISTEP percents of Students Scoring Above State Averages in English/Language Arts; and Lakeside Middle School's percents of Students Scoring Above State Averages in English/Language Arts for Grade 6 and Grade 8.

R-2 1998-1999 Indiana percents Above and Below Indiana Academic Standards in Math and English/Language Arts For Grade 6 and Grade ~.

R-3 Indiana Department of Education's School Profile for New Haven Middle School for Curriculum for 1998-1999.

The issues to be determined at this hearing were as follows:

Whether Q.W. can be "better accommodated," within the requirements of IC. 20-8.1-6.1-2 and 511 IAC 1-6-3, by the Fort Wayne Community Schools (transferee), than by East Allen County Schools (transferor). Specifically, whether Q.W. meets the requirements of 511 IAC 1-6-3 which provides:

Sec. 3. ...a student will be determined to be better accommodated in the transferee than in the transferor, as provided by I.C. 20-8.1-6.1-2, on a showing of one (1) or more of the following:

(1) curriculum~m:

(A) the student has established an academic or vocational aspiration, a curriculum offering at the high school level that is important and necessary to that aspiration is available to the student at the transferee, and that curriculum offering at the high school level or a substantially similar curriculum offering at the high school level is unavailable to the student at the transferor; or

(B) the student is capable of earning an Academic Honors diploma, the school corporation does not offer the required Academic Honors courses, and the student has completed Academic Honors diploma courses offered by the transferor and available to the student.

(4) Accreditation:

(A) the school to which the student is assigned in the transferor is not fully accredited by the board; and

(B) the student's request is related to the reason that the school has been accorded probationary accreditation status.

After consideration of the testimony and exhibits, the following findings of fact, conclusions of law, and order are made.

FINDINGS OF FACT

1. Q.W. is a sixth grade student with legal settlement within the attendance district of the Respondent.

2. The Student is currently enrolled in the sixth grade at the transferee's Lakeside Middle School.

3. Petitioner submitted a Transfer Request Application prior to April 1, 1999 to the Respondent but the application was misplaced at Respondent's administration office. As a result, Petitioner had to submit another transfer request.

4. Petitioner's second Transfer Request Application to Respondent was dated July 15, 1999. Petitioner's Transfer Request asked that Q.W. be transferred to Fort Wayne Community Schools (the transferee school corporation) for the 1999-2000 school year.

5. Petitioner's second Transfer Request Application to Respondent was based on accreditation reasons and stated that "Village Middle School has probationary accreditation status which tells me Village does not meet state requirements academically. I have verbally been offered by EAC School Administration [Respondent] a transfer to any middle school in [the] district. But due to the racial tensions within those schools my sons [sic] learning environment would still be in jeopardy."

6. Petitioner's second Transfer Request Application to Respondent was also based on curriculum reasons and stated that "I am requesting for my child to be granted a tuition transfer to Lakeside Middle School. Latin is a subject that is offered only at Lakeside Middle School & it strongly supports my sons [sic] vocational goals that he has to work in the medical field."

7. Respondent's response to Petitioner's Transfer Request Application was to circle the word "denied" but offered to provide Petitioner with transportation to any of Respondent's junior high schools or middle schools. Respondent also stated that the curriculum, ISTEP score results and student-to-teacher ratio equals or exceeds those of the transferee's Lakeside Middle School.

8. East Allen County Schools is the "transferor corporation" in this matter, as this term is defined at I.C. 20-8.1-1-7.2 and 511 IAC l~6-1(3).

9. Petitioner has a vocational goal to work in the medical field.

10. Latin as an exploratory one-semester course is offered at Lakeside Middle School as part of a language arts class.

11. New Haven Middle School in the Respondent's school district offers a course in Exploring Foreign Languages and a course in Other Foreign Language Level] I

12. Village Woods Middle School, to which the student was assigned in the Respondent's school district, is on probationary accreditation status. Respondent's representative testified that Village Woods Middle School was put on probationary accreditation status in the 1998-1999 school year.

13. No documentation was provided by Respondent to show why Village Woods Middle School was on probationary accreditation status.

14. Respondent has offered Petitioner a transfer to any middle school within Respondent's school district.

15. Respondent has offered to provide Petitioner with transportation to any of Respondent's junior high schools or middle schools.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby denominated as such, and any Conclusion of Law deemed to be a Finding of Fact is hereby denominated as such.

2. Pursuant to I.C. 20-8.1-6.1-10, the State Board of Education has jurisdiction over this matter.

3. 511 IAC 1-6-2 states, in part, "Requests for transfers under I.C. 20-8.1-6.1-2 shall be made, in writing, to the transferor by April 1 preceding the first day of school at the transferor in the school year for which transfer is requested. . .

4. 511 IAC 1-6-3(1) relating to curriculum conditions only applies at the high school level.

5. Q.W. does not meet the requirements of 511 IAC 1-6-3(1) relating to curriculum conditions.

6. The school to which the student is assigned in the transferor is not fully accredited by the SBOE.

7. The student's request is related to the reason that the transferor's school has been accorded probationary accreditation status.

8. Q.W. meets the requirements of 511 IAC 1-6-3(4) relating to accreditation conditions.

9. Respondent's denial of Petitioner's request for transfer should be reversed.

ORDER

1. The State Board of Education shall grant the transfer of Q.W. from East Allen County Schools to Fort Wayne Community Schools for the 1999-2000 school year.

Date: November 16 1999

/S/ Valerie Hall
Valerie Hall, Hearing Examiner
Indiana Department of Education

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of January 6, 2000, adopted the recommended decision of the Hearing Examiner by a unanimous vote.